Deconstructing (Western) Exceptionalism for International Crimes

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How is the War on Terror to be understood in light of the final defeat of Western troops in Afghanistan, almost 20 years to the day since 9/11? One standard reading is that the lack of accountability for Western crimes reinforces the exceptional status that Western states hold in international law. Yet this de facto status is not fixed and cannot be passively enjoyed. It requires instead an active management of both domestic and international pressures for accountability that follow apparent violations of international law.

These modes of management are dynamic responses, resulting from interactions with a diverse range of domestic, international and non-state actors. Understanding this complexity is a way of identifying where exceptionalism should be contested, as well as how less powerful states may adopt similar strategies for similar benefits. In what follows, I reflect on the techniques of accountability management relied upon by three Western states in response to allegations of international crimes, primarily in Afghanistan, and tentatively identify the implications of such practices.

These allies with similar domestic legal cultures – the United Kingdom, United States, and Canada – approached the question of avoidance of responsibility for crimes in Afghanistan in distinct but overlapping ways. Two of these states are obvious choices of study for their central role in the War(s) on Terror, and being directly implicated in huge numbers of alleged crimes. The third, Canada, is relevant because of the comparatively blunt strategy it uses to attain the same ends. All three were integral to the establishment of the rules of the International Criminal Court (ICC), the institution that grew alongside the War on Terror and which now poses the most serious (if not especially potent) threat to that exceptional status.

Examining how these states approach and develop their exceptional status with respect to allegations of international crimes shows that states pursue ‘exceptionalism’ and its benefits through a variety of strategies. Given the relative standing and power of these states internationally, the risks posed by their tactics may disproportionately burden international institutions and norms rather than the states themselves. In the realm of international criminal law, the willingness of international institutions, such as the ICC, to tolerate or accept these approaches will strengthen criticisms that these actors have reconciled themselves to the existence of double-standards in international law, even when at the expense of protecting victims of crimes.

American Avoidance

American exceptionalism in regards to accountability for Afghanistan has taken three primary forms. One is outright denial of the commission of any crimes falling within the jurisdiction of the ICC. This denial has extended across US presidential administrations, including the Biden regime, which continues to insist on the total lack of ICC jurisdiction over US personnel. Even the recent admission that a US drone strike killed only civilians (among them up to 7 children), and no ISIS-K forces, has led to no legal response, just as the Obama-era admission of torture led to a suppressed investigation into the scale and severity of the abuses and no criminal prosecutions (in spite of a good deal of 'trying').

Yet as acknowledged by the Office of the Prosecutor (OTP) itself, US authorities have engaged in some investigations, taking some theoretical steps towards meeting complementarity requirements (even as experts disagree on whether this is satisfactory or not, and evidence suggests that key information was kept from Congress).

These gestures towards complementarity disrupt the paradigm of exceptionalism by suggesting some alignment between US practices and ICC rules, even if these investigations have not been presented to the OTP as such. More pointedly, they are evidence of a desire to engage in normative reconstruction of the ICC in a way that better fits US policy, alongside other stricter rejections of ICC jurisdiction.

The argument that complementarity has been satisfied is not one put forward by the state, but by other observers. Most interesting here is the suggestion from the American Society of International Law's ICC Task Force that the United States engage in renegotiation of the terms of ICC engagement, in order to better fit US priorities. This includes modifying the complementarity standard in a way that better accords with US interests and practices. It also includes pushing the Court to move away from the "situation-as-a-whole" principle. In other words, to formally permit the OTP to only engage in limited investigations of some parties to a conflict. This would especially benefit the US because it is involved in more conflicts than any other state and risks being "enmeshed in an investigation based on the conduct of other parties". This assumes, of course, that US crimes are not as common or grave as those of other states or military actors, and comes close to suggesting that the more widespread a military's activities and crimes are, the less accountable it ought to be for its actions. Legally sanctioning partial investigations also clearly ignores the serious legitimacy deficit faced by the Court, all in the name of pandering to US exceptionalism.

The third and most notorious mode of accountability avoidance has been the leveraging of US legal power against the ICC. Threats of and actual sanctions against ICC officials and others who support the Court have been aimed at deterring investigations of US soldiers and commanders. While this Trump-era Executive Order sanctioning ICC officials was revoked by President Biden in April 2021, it is a more refined use of power. Rather than just ignoring the Rome Statute and its provisions on complementarity, the US crafted laws intended to influence

the discretionary decision-making of the OTP and other supporters of the Court. Ultimately, these approaches seem to have worked: the new Chief Prosecutor of the Court recently announced his office's intention to 'deprioritise' investigations into the United States and its allies in the Afghani national forces.

British Lawfare

Where the US has simply avoided the question of complementary domestic prosecutions as part of a larger strategy of jurisdictional denial, the UK has gone a different route. One approach has been to modify international norms by legally insulating soldiers from domestic prosecution. Royal Assent was recently granted to a bill that places a five-year statute of limitations on prosecutions for international crimes, and legislates a "presumption against prosecution" of British soldiers engaged in overseas military activities. These shifts affect modern understandings of both the seriousness of international crimes, as well as the burden to be met by prosecutors.

The new law effectively precludes domestic prosecutions for British crimes in either Afghanistan or Iraq, leaving the ICC as the only realistic site of accountability. While the OTP is not officially investigating British crimes in Afghanistan, it has not ruled out the possibility. The intermingled nature of military operations suggests such evidence may yet be uncovered (especially as evidence of a pattern of suspicious killings by the SAS has emerged).

This leads to the second avoidance approach: promoting complementarity efforts to show the ICC has no role to play. As a State Party to the ICC, the UK faces different pressure to comply with the Court's norms and rules than the US. Yet those norms privilege complementarity mechanisms that mirror the Court's own approach to specific cases, as well as those states with 'significant resources' that use them for „framing and directing legal processes so as to prolong or otherwise frustrate the pursuit of accountability". In respect to allegations of crimes in Iraq, the UK clearly sought to avoid international responsibility by engaging in a complementarity process (see Paras 117 – 120 here), albeit one that was directed at exoneration and stymying the OTP, rather than true accountability.

A similar complementarity process was developed to respond to allegations from Afghanistan. Operation Northmoor investigated 675 allegations from 159 complainants. Those investigations were formally concluded in June 2020, without any resulting prosecutions, even as evidence that information was withheld from the inquiry came to light.

Northmoor was arguably part of an ongoing strategy of avoidance reliant on institutional design, and it places the OTP in a difficult position. While the OTP has not ruled out investigating British crimes in Afghanistan, it is constrained by the findings of Operation Northmoor and its own prior determination on the inadmissibility of allegations of British crimes in Iraq. In that situation, the OTP found that while there was a 'reasonable basis to believe' war crimes were committed, it could not say there was a lack of genuineness to domestic proceedings (and

therefore that it could not investigate the allegations), notwithstanding that a decade-long domestic investigation produced no prosecutions. Given the facial comparability of the domestic 'investigations', there is reason to believe the OTP will find that the British strategy of delay, inadequate investigation, and non-prosecution again satisfies complementarity requirements.

Canadian Obstinance

In contrast to the approaches of its allies, Canada has adopted a hard line of denialism and suppression. While the US and UK have mixed gestures towards genuine investigations with other more stringent means of precluding accountability that are at least attentive to the risk of ICC investigation and prosecution, Canada has simply filibustered when presented with allegations that its troops were complicit in crimes in Afghanistan.

These allegations rest primarily on the relationship between the Canadian Armed Forces (CAF) and the Afghan National Directorate of Security (NDS). Canadian diplomat Richard Colvin, who served in Afghanistan for 17 months, testified to a parliamentary committee in 2009 that "the likelihood is that all the Afghans we handed over [to the NDS] were tortured"; this included being "beaten, subjected to electric shocks, denied sleep, and raped or otherwise sexually abused." Colvin had reported this information to superiors in May 2006, was warned off, and then threatened with legal action. A former Afghan interpreter for the CAF's intelligence unit testified that the CAF "used the NDS as a subcontractor for abuse and torture". In response to Colvin's testimony, opposition parties called for the government to release all documents on detainee abuses. Parliament was instead prorogued for an election, and ultimately only 4,000 of the estimated 40,000 documents were released in heavily redacted form. One year later, the inquiry was simply closed.

Changes in government and additional allegations have not altered the pattern of denialism and non-investigation: there were "no concerns raised" about Canadian participation in missions with Australian special forces later accused of war crimes; Canadian troops refused to cooperate with investigators in respect of abuse allegations; and, there is no need for an independent inquiry, according to the current Defence Minister (who himself served in the CAF's intelligence unit in Afghanistan).

Implications of Exceptionalist Practices

This survey of practices in relation to the War on Terror reveals that the relatively capacious label of exceptionalism captures a wide range of conduct, and that states often pursue exceptionalist protection on multiple tracks simultaneously. The first way in which this happens is through the obvious forms of denialism, threats and obstruction that all states are capable of engaging in.

At least two other relevant observations lie beyond this straightforward blunt-force approach. Importantly, exceptionalism is interactive, responsive to both international

and domestic influences. Domestic pressure can emanate from civil society as well as within the government or military. This can prompt changes in domestic law in order to preclude findings of international law violations. It can also lead to not just contestation with non-state actors, but an alignment of interests. In the US, that alignment is aimed at a normative engagement with the ICC, toward the goal of concretizing the exceptional status of the US.

Relatedly, exceptionalism in the context of international crimes frequently relies on two sites of flexibility in the ICC admissibility regime. First, accountability avoidance can flow from complementarity obfuscation: the performance of genuine proceedings as demonstrated by the breadth of investigations that are also shallow by design. Second, Western states seek to exploit the gravity threshold by minimizing the seriousness of allegations. This is done either by modifying the *tu quoque* argument to point at the comparable gravity of acts of other parties to a conflict, or suppressing relevant information that would reveal the true scale and severity of Western acts. Both of these minimization tactics are available to (and have been practiced by) non-Western states and non-state parties to conflicts, but states with more robust legal systems may also start to scale up their complementarity efforts in pursuit of the volume-based, bureaucratic negation of international jurisdiction that the US and UK have modeled.

Ultimately, however, the success or propriety of these modes of avoidance is determined in part by the toleration and interpretation of domestic processes by international agents such as the OTP. Regardless of whether the ICC is as tolerant of non-Western states engaging in similar projects, it faces a serious legitimacy threat: either it will demonstrate its tacit acceptance of double-standards in international law, or it will be accused of failing to protect the victims of atrocities.

The powerful Western state that is exceptional in (or even exempted from parts of) international law is not a fixed category but an evolving one. This ongoing evolution means exceptionalism can be both pursued and challenged at multiple sites. This in turn suggests that while powerful states may disproportionately enjoy the benefits of exceptionalism, other states can apply some of the same tactics for similar benefits. With respect to the ICC, non-Western states have traditionally relied upon more direct forms of obstruction, including non-cooperation and threatening ICC officials. Witness interference also appears problematic. While charges of interference have only been laid in respect of two ICC cases, credible allegations of interference – which require some degree of coordination that could plausibly emanate from states or parties to conflicts – have been raised in many more.

Interestingly, some efforts at excepting non-Western states from the application of the Rome Statute have taken the form of collective efforts to rely on legal arguments. The repeated non-arrest of Omar al-Bashir by multiple States Parties was part of a larger debate about immunities, non-State Parties, and the powers of the Security Council (itself an incubator for ‘exceptional’ states). As well, the attempts to have the investigation into Sudan deferred was the product of an African Union request to the Security Council to act under Article 16 of the Rome Statute. While these approaches may lack some of the ulterior motives present in other strategies outlined above, it is telling that they rely on collective legal argumentation rather

than the individualized approaches of the US, UK and Canada. This suggests a recognition on the part of some states that they do not have the requisite status or resources to act alone.

What this survey overall suggests is that Western exceptionalism might lie not in the fact of non-applicability of international law, but in the consistent enjoyment of non-applicability or reduced burdens. A hidden cost of the War on Terror may therefore be that international norms and institutions that Western states otherwise promote are diminished through both the direct practices of those states as well as their legitimation and further dispersal of tactics of avoidance.
